Artcraft Ornamental Iron Co., Inc., and Rich-Morrow Insurance Agency, Inc. *and* Shopmen's Local Union No. 626 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO. Case 9-CA-19591

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 February 1984 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel and the Charging Party Union each filed an answering brief to the Respondents' exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Artcraft Ornamental Iron Co., Inc., and Rich-Morrow Insurance Agency, Inc., Columbus, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT violate any of these rights of yours.

WE WILL NOT interrogate you, in violation of the Act, concerning your union activities, membership, or desires, or about how you voted in any election conducted by the National Labor Relations Board.

WE WILL NOT threaten you that we will shutd own our plant or go out of business in the event you become unionized or decide you would like to bargain with us collectively.

WE WILL NOT attempt to thwart your desire to bargain with us collectively, nor to evade bargaining with your Union, nor to get around NLRB certification of your Union as your bargaining representative, by terminating your employment and contracting or subcontracting out your work, or by transferring our business, for that purpose, to somebody who does so and aids and abets us in the purpose to avoid and evade the effects of your exercise of your lawful right to bargain collectively under the National Labor Relations Act.

WE WILL NOT fail to recall any laid-off employee, and WE WILL NOT discharge or terminate any employee or fail or refuse to reemploy or hire him or her because he or she has exercised any right under the National Labor Relations Act.

WE WILL NOT contract or subcontract your work out without bargaining in good faith with your Union.

WE WILL NOT set up any scheme to convert our business to one where our former foremen are

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[1] The Charging Party has moved that the Board reject the Respondents' exceptions on the ground that they fail to set forth specifically the questions of fact or law to which exceptions are taken. Contrary to the Union, we conclude that the Respondents' exceptions and brief sufficiently designate those portions of the judge's decision which they claim are erroneous. Accordingly, we hereby deny the Union's motion to strike the exceptions.

[2] We agree with the judge that Respondent Rich-Morrow Insurance Agency is the alter ego of Respondent Artcraft Ornamental Iron. In adopting this conclusion as well as the judge's remedy for the violations found, we rely particularly on the evidence that the Respondents effectuated a disguised continuance in order to avoid bargaining with the Union and that they, in fact, also violated Sec. 8(a)(3) of the Act by discharging six union adherents.

We note that no exceptions were filed regarding the judge's findings that Respondent Artcraft violated Sec. 8(a)(3) by eliminating employees' Thanksgiving and Christmas bonuses in retaliation for their union activities and violated Sec. 8(a)(5) by subcontracting certain unit work in February 1983 without bargaining with the Union and by refusing to provide the Union with information regarding the alleged sale of its assets to another business concern.

Additionally, we find it unnecessary to rely on the judge's discussion in fn. 35 of his decision concerning what effect, if any, the possible bankruptcy of Respondent Artcraft would have on this proceeding.

[3] In adopting the judge's recommendation to issue a broad cease-and-desist order requiring the Respondents to cease and desist from violating the Act "in any other manner," we do not rely on his reference to *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941). Rather, we find a broad cease-and-desist order to be appropriate because the Respondents have demonstrated a propensity to violate the Act. See *Hickmott Foods*, 242 NLRB 1357 (1979).

named as contractors or subcontractors and our employees are fired so that we can then use that as an excuse for not bargaining with the Union which you elected and which was certified by the National Labor Relations Board as specified and required by law.

WE WILL NOT in any other manner violate our employees' rights under the National Labor Relations Act.

WE WILL promptly supply your Union with information it needs from us in order to bargain properly for you.

WE WILL retroactively to 1982 reinstate your Thanksgiving bonuses and your Christmas bonuses which we discontinued without bargaining with your Union; and WE WILL pay you those benefits, with interest.

WE WILL bargain in good faith with your Union and sign any agreement reached. The appropriate collective-bargaining unit is:

> All production and maintenance employees, including structural, ornamental, installation and miscellaneous department employees employed by us (or either of us) at our Columbus, Ohio, facility, but excluding all office clerical employees, engineering employees, and all professional employees, guards, and supervisors as defined in the Act.

WE WILL offer the following persons immediate, full, and unconditional reinstatement to their former jobs (or, if they no longer exist, to substantially equivalent jobs), with full seniority, privileges, and benefits, and WE WILL make them whole for any losses they may have suffered in wages lost and otherwise, plus interest, since we discharged them on or about 29 April 1983.

Steve R. Friley	Robert William Deal
Ronald Lee Monroe	William M. Diedrich
Wilson Ford	Jeffrey F. O'Hara

In the case of Wilson Ford and Jeffrey F. O'Hara, Artcraft Ornamental Iron Co., Inc. will make them whole additionally plus interest for wages and other sums and benefits lost for the period from February to 29 April 1983, or any part thereof during which they or either of them were or was discriminatorily not recalled from layoff, as well as after 29 April 1983 as in the case of the foregoing other employees.

ARTCRAFT ORNAMENTAL IRON CO., INC., AND RICH-MORROW INSURANCE AGENCY, INC.

DECISION

STATEMENT OF THE CASE

STANLEY N. OHLBAUM, Administrative Law Judge. This proceeding[1] under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the Act), was litigated before me in Columbus, Ohio, on August 29 through September 1, 1983, with all parties participating by counsel or other representative and afforded full opportunity to present evidence and contentions, to propose findings and conclusions, and to file posttrial briefs which were received by October 21, 1983, after an unopposed request for a time extension. Records and briefs have been carefully considered.

The principal issues are whether Respondent Employers violated Section 8(a)(1), (3), and (5) of the Act through interrogation of employees concerning their union affairs and vote in an NLRB-conducted representation election; threat of plant closure in case of unionization; discontinuance of established Thanksgiving and Christmas bonuses; unilateral subcontracting of collective-bargaining unit work; failure to recall to work laid-off bargaining unit employees; termination of and failure to recall bargaining unit employees; purported subcontracting of bargaining unit work to supervisory personnel; refusal to furnish necessary bargaining information to bargaining unit Board-certified bargaining representative; refusal to bargain with Board-certified bargaining representative of unit employees; and colorable discontinuance of business of Respondent Artcraft Ornamental Iron Company and transfer to Respondent Rich-Morrow Insurance Agency as alter ego and successor to avoid and evade collective-bargaining obligations under the Act with unit employees' Board-certified bargaining representative.

On the entire record and my observations of the testimonial demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Artcraft Ornamental Iron Co., Inc. (Artcraft Iron), an Ohio corporation with an office and place of business in Columbus, Ohio, has been engaged in the business of fabricating and installing structural steel. During the 12 months immediately preceding issuance of the complaint, a representative period, in the course and conduct of its business, Artcraft Iron purchased and received at its Columbus facility directly in interstate commerce from places outside Ohio products, goods, and materials valued in excess of $50,000.

At all material times since about May 1, 1983, Respondent Rich-Morrow Insurance Agency, Inc. (Rich-Morrow; Rich-Morrow doing business as Artcraft Iron), an Ohio corporation with an office and place of business in Columbus, Ohio, has been engaged in the business of supplying custom ornamental and structural iron prod-

[1] The complaint was issued June 14, 1983, as amended at the trial, growing out of a charge filed by the Charging Party Union on April 26 as amended May 13 and June 3, 1983.

ucts to retail and commercial customers. Based on a projection of its operations since their commencement about May 1, 1983, Rich-Morrow doing business as Artcraft Iron will, in the course and conduct thereof, annually purchase and receive at its Columbus facility directly in interstate commerce from places outside Ohio products, goods, and materials valued in excess of $50,000; and, during the same projected period, in its business operations, it will annually sell to commercial customers goods and products valued in excess of $50,000.

I find that, as admitted by Artcraft Iron in its answer and by Rich-Morrow at the trial, at all material times Respondent Artcraft Iron has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all material times Respondent Rich-Morrow also has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that at all material times the Charging Party Union has been and is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

This case essentially involves the contention by the General Counsel of the Board and by the Charging Party Union, disputed by Respondents, that, after sundry alleged violations of the Act, including impermissible interrogations and threats surrounding a union organizational campaign to go out of business in the event of unionization, upon the Board's subsequent certification of the Union based upon overwhelming vote of the bargaining unit employees in a statutory election under the Act, Respondent Artcraft Iron (a well-established ironworks fabricator) in order to frustrate and nullify the outcome of the official election and the Board's certification, so as to attempt to escape its bargaining obligation under the Act, colorably shifted its assets and business to Respondent Rich-Morrow ("doing business as Artcraft Iron"), an insurance agency owned by the son-in-law of the principal of Artcraft; so that, under the circumstances, Rich-Morrow, doing business as Artcraft Iron, as a knowing participant therein, is the alter ego and successor of Artcraft Iron, and as such is obligated to bargain with the Board-certified Union, the Charging Party here.

Since the allegations of the complaint, covering 8 pages and 18 paragraphs, are somewhat awkwardly set forth, other than chronologically, it will conduce to clearer understanding of the facts to recast and deal with them chronologically as they are alleged to have occurred. The following chronological chart synthesizes them (and related events) accordingly:

Date or Approx. Date	*Allegation or Event*	*Respondent(s) Involved*[2]	*Complaint par(s).*	*Act Sec(s).*
Sep. 23, '82	Union files petition for NLRB election			
Oct. 29, '82	NLRB Reg. Dir. issues Decisions and Direction of Election (Case 9-RC-14152)			
Mid-Nov. '82	Interrogation by Artcraft through Supervisor Graham	A	7(a), 15, & 18[3]	8(a)(1)
Mid-Nov. '82 (3 occasions)	Threat of plant closure for unionization by Artcraft through Supervisor Graham	A	7(b), 15, & 18[3]	8(a)(1)
Late Nov. '82	Interrogation re NLRB election vote by Artcraft through Supervisor Graham	A	7(c), 15, & 18[3]	8(a)(1)
Nov. 23, '82	Board-conducted election; Union elected overwhelmingly as bargaining rep. of Respondent's unit employees			
Nov. 24, '82	Discontinuance of established Thanksgiving bonus practice	A	8(a), 16, & 18[3]	8(a)(1) & (3)
Dec. 2, '82	Union certified by NLRB		9(b)	
Dec. 25, '82	Discontinuance of established Christmas bonus practice	A	8(a), 16, & 18[3]	8(a)(1) & (3)
Since Jan. 19, '83	Refusal to provide Union with required bargaining information	A & R-M	11(a), 11(c) 12, 17[5];[6], & 18[3];[6]	8(a)(1) & (5)

[2] A: Artcraft Iron; R-M: Rich-Morrow doing business as Artcraft Iron.
[3] Second paragraph 16 of complaint misnumbered 16 instead of 18.
[4] Date (i.e., year) as amended at the trial.
[5] Second paragraph 15 of complaint misnumbered 15 instead of 17.
[6] Pars. 17 and 18 under the General Counsel's trial-end motion, granted without opposition, to conform pleadings to proof.

Date or Approx. Date	*Allegation or Event*	*Respondent(s) Involved*[2]	*Complaint par(s).*	*Act Sec(s).*
Feb. 2, '83[4]	Bargaining unit work subcontracted out unilaterally	A	10(a), 10(c), 17[5], & 18[3]	8(a)(1) & (5)
Mid-Feb. '83	Failure to recall laid-off unit employees O'Hara & Ford	A & R-M	8(b), 8(e), 16, & 18[3]	8(a)(1) & (3)
Since Apr. 28, '83	Refusal to provide Union with info. re alleged transfer of business from A to R-M	A & R-M	11(b), 11(c), 12, 17[5], & 18[3]	8(a)(1) & (5)
Since Apr. 28, '83	Refusal to bargain with NLRB-certified Union	A & R-M	13, 14, 17[5], & 18[3]	8(a)(1) & (5)
Apr. 29, '83	R-M succeeds to business of A, including inventories and contracts for work in progress	A & R-M	4(a), 4(b) & 4(c)	
May 1, '83	A terminates 6 employees; R-M refuses to reemploy them, instead ostensibly "subcontracting" their work to its own supervisors	A & R-M	8(c), 10(b), 10(c), 16, 17[4], & 18[3]	8(a)(1) & (3)
Since takeover of A by R-M (on or about April 29, 1983)	R-M is alter ego and successor of A	A & R-M	4(a), 4(b), & 4(c)	8(a)(1), (3), & (5)

It is to be noted that Respondents rested their case, at the close of General Counsel's case, without calling any witnesses.

B. *Facts as Found*

1. Respondent Artcraft Iron: September 1982–April 29, 1983

Artcraft Iron, in business for almost 50 years (i.e., since 1936) in Columbus, Ohio, is a long-established fabricator/seller/installer of structural ironwork, including beams, columns, and framing members for buildings, as well as decorative and also ordinary ladders, stairways, and railings, some bearing its logo "Artcraft" (and some of its other registered logo "Trashmaster"). Personnel of Respondents who figure in events to be described are:

Arthur ("Art") L. Braun: president and principal (allegedly 51 percent shareholder[7]) of Respondent Artcraft Iron; brother of Walter Brown; uncle of Jeffrey Louis Brown, general manager of Respondent Artcraft Iron and also of Respondent Rich-Morrow doing business as Artcraft Iron.

Walter ("Wally") Brown: vice president and principal (allegedly 49 percent shareholder) of Respondent Artcraft Iron; brother of Arthur L. Braun and father of Jeffrey Louis Brown; now allegedly a salesman for Respondent Rich-Morrow doing business as Artcraft Iron, but performing same duties there as he had for some 30 years with Respondent Artcraft Iron.

Jeffrey ("Jeff") Louis Brown: general manager of Respondent Artcraft Iron (at $450 per week) to April 29, 1983; since April 29, 1983, general manager of Respondent Rich-Morrow doing business as Artcraft Iron (at $550 per week).

Helen Liles ("Lisles"): bookkeeper, secretary, and receptionist for Respondent Artcraft Iron and also for Respondent Rich-Morrow doing business as Artcraft Iron.

Mildred A. Brown: wife of Walter Brown and mother of Jeffrey Louis Brown; relief to Helen Liles under Respondent Rich-Morrow doing business as Artcraft Iron as well as under Respondent Artcraft Iron.

June L. Braun: wife of Arthur L. Braun.

Ward Argust: president and sole principal of Respondent Rich-Morrow; son-in-law of Arthur L. Braun and husband of latter's daughter Cheryl Braun Argust (who is also an officer of Respondent Rich-Morrow).

According to Jeffrey Louis Brown, general manager of each of Respondents and nephew of enterprise founder Arthur L. Braun, the building housing the business operations here of Respondent Artcraft Iron (and, as will be shown, subsequently without interruption and currently of Respondent Rich-Morrow doing business as Artcraft Iron) was and continues to be owned by Arthur L. Braun and was occupied by Respondent Artcraft Iron for some 30 years under oral lease from Arthur L. Braun, the president and principal of Respondent Artcraft Iron. Also according to Jeffrey Louis Brown, all equipment of Respondent Artcraft Iron was owned by Arthur L. Braun and not by Artcraft Iron. (As will be shown infra, it is claimed that lease as well as equipment were, following the Charging Party Union's certification by the Board as bargaining representative following the officially conducted election, turned over to Respondent Rich-Morrow doing business as Artcraft Iron—thereby, under circumstances to be shown, according to Respondents, extinguishing or rendering nugatory any bargaining obligation notwithstanding the official certification.)

[7] According to testimony of Jeffrey Louis Brown, general manager of each of Respondents, all records of stock ownership in Artcraft Iron were destroyed by water in the basement of Artcraft Iron's former attorney.

Union organizational activity commenced among Respondent Artcraft Iron's employees in late August 1982. On September 23, 1982, the Charging Party Union filed its petition with the Board's Cincinnati, Ohio Regional Director, upon the requisite showing of employee interest, seeking certification as bargaining representative for a conventional production and maintenance unit of Artcraft Iron's employees (G.C. Exh. 3); and on October 29, 1982, the Regional Director issued his Decision and Direction of Election under the Act (G.C. Exh. 4). That election was held on November 23, 1982. Prior thereto, however, as well as shortly thereafter, a number of violations of the Act by Respondent Artcraft Iron are alleged to have occurred.

a. *Interrogations*

The complaint (pars. 7(a), 7(c), 15, and 18[8]) alleges that in mid-November 1982 Respondent Artcraft Iron, through its department supervisor David Graham, conducted employee interrogation in violation of Section 8(a)(1) of the Act concerning union activity and NLRB election balloting. In support of these allegations, Artcraft Iron former employee William Reverody Ford testified that on several occasions, 2 or 3 weeks before the election, Supervisor Graham, after remarking to Ford that he had been "awful quiet," asked him how he felt about the Union. Ford replied that he favored it for job security. Another former employee, Robert William Deal, testified that in December 1982, shortly after the election, Graham questioned him on whether he was in favor of the Union; Deal replied, "I don't know yet." Still another former employee, William M. Diedrich, testified that, shortly after the election, Graham also questioned him how he felt about the Union (which had just been voted in overwhelmingly by the employees); as fellow employee Ford, Diedrich also responded noncommittally, "I really don't know." Yet another former employee, Steve Friley (who had been in Artcraft Iron's employ for around 5 years), was similarly approached by Graham about an hour after the Board-conducted election and asked how he had voted; his response was, "It [is] none of [your] business."

All of the above-named four former employees impressed me, to my close observation, as sincere and I credit their testimony, which was totally uncontroverted by Graham or in any other way. (All four employees were subsequently terminated.) I accordingly find the complaint allegations concerning unlawful interrogation established substantially as alleged.

b. *Threats of plant closure in case of unionization*

The complaint (pars. 7(b), 15, and 18[9]) also alleges that in mid-November 1982 Artcraft Iron Department Supervisor Graham threatened employees with plant closure in the event of unionization. No less than five of Artcraft's former employees—Monroe, Friley, Diedrich, Deal, and Ford, all since terminated—testified credibly to this effect, again without any contradiction of their testimony. Thus, after hearing plant principal Arthur Braun state, in September 1982, that "I'll shut the f—ing doors before the union comes in," former employee Ronald Lee Monroe also heard Department Supervisor Graham state to him and several other employees, about a week before the ensuing Board-conducted election, "[General Manager] Jeff [Brown] would put a chain around the building, and a padlock to match it, before the union would come in." Monroe further testified that also prior to this, after the inception of union organizational activity, his supervisor Graham had also stated that "Artcraft never was union, never would be union, and before they was, Jeff [Brown] would shut the doors or sell out." Former employee Friley credibly testified, in a similar vein, that on about a half-dozen occasions during the month before the Board-conducted election Graham repeatedly stated to him and another employee, "[I]f the union [gets] in . . . within six months the place would shut down, and [you would] be looking for work." Employees Diedrich, Deal, and Ford testified credibly to the same effect.

Monroe further testified credibly and without contradiction that on April 21, 1983, he was threatened by Artcraft Iron Foreman John Graham that Manager "Jeff Brown was going to subcontract out the individual [work] bays to each one of the foremen and they would keep who they wanted, and whoever they didn't want, they'd let go."

The testimony of these witnesses is totally uncontroverted, Respondents having elected without explanation to rest without producing any witnesses.

Crediting the uncontradicted testimony of the indicated five former employee witnesses on this subject, I find the complaint allegations concerning unlawful threats of plant closure in the event of unionization established.

c. *Discontinuance of established Thanksgiving and Christmas bonus practice*

As indicated above, the official Board-conducted election took place on November 23, 1982, resulting in an overwhelming vote in favor of representation by the Charging Party Union. One day later, on November 24, Respondent Artcraft Iron summarily discontinued its established Thanksgiving bonus practice ($15 gift certificate) and also, on Christmas, its established Christmas bonus practice ($50–$125)—the latter, at least, clearly unilaterally since the Union had meanwhile on December 2 been officially certified by the Board as bargaining representative (G.C. Exh. 5).

The complaint (pars. 8(a), 16, and 18[10]) alleges that Respondent Artcraft Iron took these actions, in violation of Section 8(a)(1) and (3) of the Act, in reprisal against its employees for exercising their right to bargain collectively as guaranteed by the Act, and to discourage such activity.

It being established through credited and, again, wholly uncontroverted testimony of the General Counsel's witnesses Ronald Lee Monroe and William L. Purdy that Respondent Artcraft Iron indeed took the de-

[8] See fn. 3 supra.
[9] See fn. 3 supra.
[10] See fn. 3 supra.

scribed actions, and without bargaining (cf. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964)); *NLRB v. Katz*, 369 U.S. 736 (1962), and this Respondent having wholly failed to answer or to rebut or disestablish by preponderating or indeed by any evidence whatsoever the General Counsel's prima facie showing of a violation in this regard, or in any way to demonstrate that its described actions were for a reason or reasons other than in reprisal, retaliation, and to discourage protected concerted activities under the Act, I find the complaint allegations in this regard established. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

d. *Failure and refusal to furnish required bargaining information*

Subsequent to the Board's December 2, 1982 official certification of the Charging Party Union as bargaining representative of the unit employees, bargaining ostensibly commenced in January 1983. It has gotten nowhere at all, the eventual outcome being Respondent Artcraft Iron's shiftover of its business at the end of April 1983 to Respondent Rich-Morrow doing business as Artcraft Iron, under circumstances to be described, since when Respondent Artcraft Iron denies any bargaining obligation on the ground it is no longer in business and no longer has any employees, and Respondent Rich-Morrow doing business as Artcraft Iron denies any bargaining obligation on the ground that the Board's certification does not extend to it since it is neither an alter ego of nor a successor to Artcraft Iron.

Since the inception of bargaining in January 1983, however, as alleged in the complaint (pars. 11(a), 11(c), 12, 17,[11] and 18[12]), the Charging Party Union has, as established by uncontradicted credited testimony of the General Counsel's witnesses Deal, O'Hara, and Purdy, sought and requested information necessary to the conduct of collective bargaining regarding hire dates and rates of pay and cost factors on insurance, vacations, and holidays. Although these are wholly usual and conventional items of information, needed and invariably sought by and required to be furnished to bargaining representatives as essential to informed collective bargaining,[13] the Union's requests for this information have, as established by uncontradicted credited evidence, been unavailing.[14]

It is accordingly found that Respondents have failed, without justification, to supply the Charging Party Union with the indicated necessary and properly required bargaining data as alleged in paragraphs 11(a) and 11(c) of the complaint.

e. *Unilateral subcontracting of unit work by Respondent Artcraft Iron*

The complaint (pars. 10(a), 10(c), 17[15] and 18[16]) also alleges that in early February 1983[17] Respondent Artcraft Iron, in further violation of Section 8(a)(1) and (5) of the Act, unilaterally without bargaining with the Charging Party Union subcontracted unit work to nonunit personnel.

Concerning this, Respondent Artcraft Iron's former production employee Ronald Lee Monroe testified credibly and without contradiction that when he returned to his regular job of spray painting in February 1983, after a month's layoff subsequent to the Board's certification of the Charging Party Union, he observed for the first time since he had started there in 1979 his two cousins Steve and Kevin Hern, operating under the style of "H&H Fabrication," building front-load containers ("dumpsters") as "subcontractors"; and he himself (i.e., Monroe), by arrangement with Artcraft Iron General Manager Jeffrey Brown, was paid for spray painting them after his regular working hours by check of H&H Fabrication, although he used Artcraft Iron's materials in doing the job. Monroe explained here that, although the iron fabrication work was performed by these subcontractors, production employees of Respondent Artcraft Iron were fully capable of doing it.

Respondent Artcraft Iron's only possible explanation for subcontracting out the above-described unit work in February 1983 unilaterally and without bargaining with the Board-certified Union was suggested by its general manager Jeffrey Brown, who, called by the General Counsel as an adverse witness, while conceding that this work had indeed been subcontracted out over the period from February until July 1983 (*and thus also encompassing and involving Respondent Rich-Morrow doing business as Artcraft Iron*, which allegedly took over the entire business about April 28–May 1, 1983, as will be shown infra), stated that an earlier fabrication of such dumpsters, some 10 years before, had not been done by Artcraft Iron but by an outside contractor. This, however, neither explains nor excuses the unilateral subcontracting out of this work in February–July 1983, after the Union's certification, since the unit employees had the capability of doing it (indeed, employee O'Hara had actually worked on dumpsters) and, furthermore, concededly (according to General Manager Brown) it was done on Respondents' premises with their own materials and equipment. General Manager Brown further conceded that, in addition to the February–July 1983 subcontracting of dumpster fabrication to nonunit employees, no less than perhaps seven other subcontracts were let out around

[11] See fns. 5 and 6 supra.

[12] See fn. 3 supra.

[13] See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *NLRB v. Whitin Machine Works*, 217 F.2d 593, 594 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). Re: hire and wage data, see *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938 (1956), summarily reversing, without argument or opinion, 235 F.2d 319 (9th Cir. 1956); *Puerto Rico Telephone Co. v. NLRB*, 359 F.2d 983 (1st Cir. 1966); *Curtiss-Wright*, supra; *Woodworkers v. NLRB*, 263 F.2d 483, 484 (D.C. Cir. 1959); *Whitin Machine Works*, supra. Re: insurance cost data, see *NLRB v. Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979); *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852 (1966); *NLRB v. John S. Swift Co.*, 277 F.2d 641 (7th Cir. 1960). Re: vacations and holidays cost data, see *Curtiss-Wright*, supra; *Weber Veneer & Plywood Co.*, 161 NLRB 1054 (1966).

[14] The only item supplied by Respondents has been a copy of a hospital plan brochure and the name and telephone number of an insurance company. This clearly does not comply with the indicated requests.

[15] See fn. 5 supra.

[16] See fn. 3 supra.

[17] See fn. 4 supra.

this time to outside, nonunit subcontractors involving unit work, in some instances even performed on Respondents' own premises but by nonunit personnel. The excuses advanced at the hearing for these instances were that the jobs were incidental or that the unit employees might have been otherwise busy, if not on layoff. The fact remains, however, that so far as these instances of contracting out of unit work occurred subsequent to the Charging Party Union's certification they were likewise unilateral.

Under these circumstances, I find the allegations of the indicated complaint paragraphs, concerning unilateral subcontracting in February 1983, established. Cf. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Katz*, 369 U.S. 736 (1964).

f. Failure to recall temporarily laid-off unit employees O'Hara and Ford

The complaint alleges (pars. 8(b), 8(e), 16, and 18[18]) that in mid-February 1983, following a temporary layoff subsequent to the Union's certification, Respondent Artcraft Iron failed to recall its unit production employees O'Hara and Ford, although other employees were recalled.

Jeffrey F. O'Hara had been in Respondent Artcraft Iron's employ as an all-around layout man/fitter/welder and field crane operator for 1-1/2 years as of his layoff at the end of December 1982. No contention is raised that his work was in any way unsatisfactory. However, he also happened to have been the kingpin and key union organizer in the shop, as well as the union observer at the Board-conducted election. He had been openly active on behalf of the Union and wore a union T-shirt at work and attended all contract negotiating sessions in this plant highly hostile to any union sentiment. His father-in-law was also, to the knowledge of Respondent Artcraft Iron department supervisor Shelby McFarland Sr., as well as throughout the plant, a full-time union representative. When it came time to recall the employees to work in February, O'Hara was, for no visible reason or explanation here, not recalled—nor has he ever been.

Similarly, Respondent Artcraft Iron's former experienced welder Wilson Reverody Ford, who was also openly advocative of the Union and wore a union T-shirt at work even though twitted on the subject by General Manager Brown ("Just because they gave you beer and T-shirts it don't mean you have to vote for them"), was also laid off in December 1982 shortly following the Union's certification by the Board, even though a week before the Board-conducted election General Manager Brown had stated he saw no prospect of a layoff and that a new job was coming up in April (1983). At the time of his December (1982) layoff, Ford received a letter indicating the reason was that work was "slow," rating his work as "commendable," and that he would be recalled with a pickup of work. Among other things, Ford, an experienced welder, is (as stipulated on the record) capable of welding dumpsters (i.e., work unilaterally subcontracted out in February–July 1983). However, as with O'Hara, supra, Ford has, without visible reason or explanation here, never been recalled.

In both of these cases—O'Hara and Ford—considering their work qualifications and capabilities, their prior satisfactory work performance, the recall of others not shown to have equivalent, much less superior, qualifications or seniority, and the fact that there was substantial work on hand to be done in (as well as after) February 1983, within the frame of reference of their openly known and avowed union organizational activity, the General Counsel has succeeded in establishing, I find, a prima facie case of failure to recall by reason of those union activities; and, since Respondents have elected, without explanation, not only to adduce no preponderating countervailing proof, but none at all, I find the complaint allegations under discussion established. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

g. Failure and refusal to bargain with Board-certified Union since April 28, 1983, or to supply Union with requested data

The complaint further alleges (pars. 11(b), 11(c), 12, 13, 14, 17[19] and 18[20]) that since April 28 Respondents have failed and refused to bargain with the Charging Party as the Board-certified collective-bargaining representative of the unit employees, including failure and refusal to provide the Union with necessary information concerning an alleged block transfer and shifting, on and around that date, of the business of Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron.

Credited, uncontradicted testimony establishes that since the time of the purported shiftover of the business operations and assets of Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron, under circumstances detailed infra (sec. II,B,2), neither Respondent has bargained with the Board-certified Union—Respondent Artcraft Iron seemingly on the basis that it has purportedly gone out of business and there is no longer any bargaining unit of its employees; and Respondent Rich-Morrow doing business as Artcraft Iron seemingly on the basis that there is no longer any bargaining unit, that the Union holds no certification applicable to it, and that, unlike its predecessor, Respondent Artcraft Iron, it is under no obligation to bargain with the Union. The Union's certified letters requesting bargaining and data concerning the transfer (G.C. Exhs. 19 and 20) have been unanswered and unavailing.

The circumstances of the purported business transfer, and the related contentions of the parties, are considered below. Meanwhile, however, it is found, without contest, that, as alleged in the complaint, since April 28, 1983, Respondents and each of them have continued to fail and refuse to bargain with the Charging Party Union, including failing and refusing to provide data concerning the alleged transfer and shiftover of the business and assets

[18] See fn. 3 supra.

[19] See fn. 4 supra.

[20] See fn. 3 supra.

of Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron.

We proceed, then, with a description and consideration of that transfer and shiftover.

2. Shiftover to Respondent Rich-Morrow doing business as Artcraft Iron of business and assets of Respondent Artcraft Iron: April 1983 to present

According to the complaint (pars. 4(a), 4(b), 4(c), 8(c), 10(b), 10(c), 16, 17[21] and 18[22]), as fleshed out by the proof, around April 28–May 1, 1983, and continuing since then, as a feature of a unilateral purported transfer and shiftover of the business and assets of Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron, all employees in the Board-certified bargaining unit have been unilaterally discharged and the business unilaterally purportedly converted to an operation under which the former supervisors purport as "independent contractors" to employ the former bargaining unit employees, in a colorable scheme to do away with the certified bargaining unit and eradicate the official Board certification and thereby eliminate the Charging Party Union as the duly elected statutory bargaining representative of the employees, it being further alleged that under the circumstances Respondent Rich-Morrow doing business as Artcraft Iron is a disguised continuation and alter ego of and successor to Respondent Artcraft Iron.

Against the background of uncontested unfair labor practices and violations of the Act already portrayed and found (secs. IIA and IIB, supra), the further underlying facts are as follows.

Credited testimony of Respondent's former shop foreman and department supervisor Shelby E. McFarland Sr., testifying as the General Counsel's subpoenaed witness, establishes without contradiction that in early April 1983 he was informed by General Manager Jeffrey Brown, after some "six months" of study by Respondent (i.e., since shortly after the advent of the union organizing activity—bearing out Respondent's prediction, supra), that "to improve on the whole business operation . . . we foremen would have the first opportunity to go into the subcontracting position . . . May 1st," but involving no outlay or monetary expense on the part of the subcontractors, who would continue to operate in Respondent's premises as when they were foremen, with Respondent's facilities and goods and supplies and even Respondent's bookkeeping and other support—in other words, essentially no change except in nomenclature. Credited, uncontroverted testimony of McFarland further establishes that about 2 weeks later—i.e., in mid-April 1983—he as well as the other foremen were assembled by General Manager Brown and also Respondent Artcraft Iron's president and principal, Arthur Braun's son-in-law Ward Argust, both of whom in essence described the same plan. There is no indication that anything was said about any sale or transfer of the business of Respondent Artcraft Iron to Respondent Rich-Morrow Insurance Agency, Inc. (of which Braun's son-in-law Ward Argust was president).

Credited and uncontroverted testimony of Respondent's former employee Steve Friley—who had been in its employ for about 5 years, as a painter, welder, forklift driver, and field erector, until his termination on April 29, 1983—further establishes that toward the end of April 1983, General Manager Jeffrey Brown informed all of the shop employees, in the presence of General Manager Jeffrey Brown's father, Wally Brown (vice president and a principal of Respondent Artcraft Iron), "Well, boys, the sh-t's done hit the fan," and that "a company in Mansfield" (without disclosing the identity to be Respondent Rich-Morrow Insurance Agency, Inc. of Mansfield, Ohio, about 75 miles distant, owned by Arthur Braun's son-in-law Ward Argust, who lives in Mansfield) was taking over. When asked if this was "an easy way to get out of the union," Brown denied it. Brown also told the employees that if they wanted work (i.e., at the very same plant, at the very same operation, at their very same work) to "talk to the foremen." (As will be shown, Friley was never permitted to work there again, although there was ample work on hand.)

Credited, uncontroverted testimony of former employee Ronald Lee Monroe—a spray painter, layout man, welder, and miscellaneous equipment operator in Respondent Artcraft Iron's employ for some 4 years until he also (with the other unit employees) was terminated on April 29—establishes that on April 21 foreman and department supervisor David Graham told him General Manager Jeffrey Brown was going to contract out the individual work bays at Respondent Artcraft Iron's premises to its foremen and subcontract the Company's work to them; and that when the production employees met with General Manager Brown on Wednesday, April 27 (2 days before their termination), and asked him to explain what was going on, Brown's response was merely that he had sold the Company to "a company in Mansfield," the name of which he declined to disclose, but he assured the men that the same usual staff would still continue to do the bidding on jobs. In response to a question, he denied the purpose was "to get out of the union." As in the case of unit employee Friley, supra, Monroe, who likewise was openly and avowedly a union backer and who was on the union bargaining committee, also was at all times after his termination refused work, although it was being done by others as well as by former supervisors.

Former employee Robert William Deal—layout man, fitter, welder, and outside erector—also testified credibly and without contradiction that at a previously scheduled bargaining session on April 28 General Manager Brown refused to bargain any more on the ground the "company had been sold." Ward Argust, who was standing by, said nothing, merely nodding "yes" or shaking his head "no" when questions were directed to Brown, who stated he did not know to whom the company had been sold. As in the cases of Friley and Monroe, Deal also, who was likewise on the bargaining committee, has been refused employment at all times since his termination on April 29, although he observed work to be on hand with

[21] See fn. 4 supra.
[22] See fn. 3 supra.

others including new employees working there. Deal's account of what occurred at the scheduled April 28 bargaining session is corroborated by former employee Jeffrey F. O'Hara (layout man, fitter, welder, and field crane operator), another ardent unionist who likewise has never been given any work after his layoff on December 31, 1982. Finally, credited and uncontradicted testimony of the Charging Party Union's district representative, administrator, and chief bargaining spokesman William L. Purdy further establishes that not until the negotiating session scheduled for April 28, 1983—1 day before the Friday, April 29, termination of Respondent's unit employees—was he told, at that brief session, by General Manager Brown that there would be no meeting or further negotiations because "the company had been sold"; and that, in response to questioning, Brown claimed he had been unaware of the pending sale and did not know the identity of the purchaser.[23] At no time had Respondent Artcraft Iron indicated to the Union that it contemplated any change in the nature of its operations, including subcontracting,[24] nor did it bargain with regard to it.

Respondents' answers admit that about April 29, 1983, Respondent Rich-Morrow purchased Respondent Artcraft Iron's inventory and contracts for work in progress.

On April 29, 1983, the Union wrote a letter by certified mail to General Manager Brown and Respondent Artcraft Iron, received by Brown a few days later, requesting further dates for bargaining (G.C. Exh. 19). The letter was neither answered nor acknowledged. Again on May 16, 1983, the Union wrote another certified letter to Brown and Respondent Artcraft Iron (receipted for May 17) requesting the identity of the new owner, for the purpose of continuation of bargaining (G.C. Exh. 20). That letter was likewise neither answered nor acknowledged. Nor has any communication between the parties occurred since then other than in this proceeding.

Meanwhile, about April 29, 1983, all six unit employees of Respondent Artcraft Iron[25] were, concededly, terminated, without notice to or bargaining with the Union in any way, including as to the intended terminations or as to the effect thereof. None has ever been rehired. Respondent's foreman Graham's uncontroverted threat to Monroe that Manager "Jeff Brown was going to subcontract out the individual [work] bays to each one of the foremen and they would keep who they wanted, and whoever they didn't want, they'd let go," will be recalled.

It is undisputed that all unit employees were terminated on April 29, 1983 (Friday), and it is stipulated that "[c]ommencing on or about May 1, 1983 [Sunday], Respondent Rich-Morrow contracted work previously done by employees of Respondent Artcraft to among others Shelby McFarland, David Graham, John Graham and Chuck McConnell" (*G.C. Exh. 6, par.* 3), of whom, other than John Graham, all are stipulated to have been supervisors and agents, within the meaning of the Act, of Respondent Artcraft through April 29, 1983 (*id. par.* 1).

Respondents' (i.e., both Respondents') general manager Jeffrey Brown and Respondent Rich-Morrow president and principal Ward Argust were called only by the General Counsel as adverse witnesses and testified as such. (As indicated before, both Respondents rested at the conclusion of the General Counsel's case without calling any witnesses.) Both Brown and Argust described the nature of the purported transfer/shiftover transaction between Respondents about April 29, as well as the nature of the business before and after that date. These subjects will now be delineated.

Respondents' general manager Brown (son of Respondent Artcraft Iron's vice president and principal Wally Brown and nephew of its president and principal Arthur L. Braun, father-in-law of Respondent Rich-Morrow's president and principal Ward Argust) testified that he was general manager of Respondent Artcraft Iron, at $450 per week, until April 29, 1983, when he executed a "bill of sale" and an "agreement for purchase of assets" to Respondent Rich-Morrow and, without hiatus in business operations or execution of his duties, became general manager of Respondent Rich-Morrow at $550 per week. For practical purposes, he ran Respondent Artcraft Iron and now runs Respondent Rich-Morrow, which also does business—the same business, at the same location, with the same machinery and equipment, and essentially, with the exception of the terminated unit Union employees, the same personnel—as Artcraft Iron. According to Brown, the only real alleged change was that the foremen ("department supervisors"—see stipulation, G.C. Exh. 6) were designated as subcontractors and they allegedly had the rank-and-file (unit) employees working for them (i.e., the foremen) instead of for Respondent. But the mechanics of this alleged arrangement are interesting. The foremen continued to do so substantially what they had previously done, and so did the rank-and-file (unit) employees, on the same premises (i.e., Respondent's/Respondents' premises), using all of the same facilities, machinery, and equipment (i.e., Respondent's/Respondents') without change or charge, including even Respondent's/Respondents' same bookkeeper/secretary/receptionist (Helen Liles), who took charge of and who ran all of the foremen's books and records. No foreman made any monetary investment whatever. In some instances, former foremen were teamed up, as of May 1, 1983, with certain favored former rank-and-file (unit) employees[26] to form alleged

[23] The uncontroverted proof establishes that by no stretch of the imagination may the parties be regarded as having arrived at impasse, and I so find.

[24] Other than the subcontracting of dumpster work (supra sec. II,B,1), which had been done unilaterally and without bargaining with or agreement of the Union.

[25] I.e., Robert William Deal, William M. Diedrich, Wilson Ford, Steve R. Friley, Ronald Lee Monroe, and Jeffrey F. O'Hara.

[26] E.g., former supervisor David Graham was teamed up with his brother, rank-and-file (unit) employee Ben Graham, as "Creative Metals"; former supervisor Chuck McConnell was teamed up with rank-and-file (unit) employees Bill Combs and Miles McDowell as "B&C Iron Erection"; and former supervisor Shelby E. McFarland, Sr. was teamed up with rank-and-file (unit) employees Shelby McFarland, Jr. and Otis Lewis as "Hudson Steel Fabricators [Fabricating]." On the other hand—presumably to make up for unit employees and union loyalists who were terminated (supra), former supervisor John Graham was established as "J&G [J.G.] Ornamental Iron [Co.]," with new "employees" (his brothers).

partnerships or other loose associations with their trade names listed on removable signs on the outside of the building. Respondents' general manager Brown testified that after paper transfer/shiftover from Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron, accomplished over a weekend (April 29–May 1, 1983), the same customers and geographical area continued to be served—although, according to him, there was increased concentration on fabrication rather than on outside erection.[27] According to Brown, each of the former foremen/supervisors who are now dubbed subcontractors operates in his usual designated area or bay, with common areas including storage areas, as previously, using Respondents' equipment including even trucks, and Respondent continues to furnish and pay for utilities (cost of which is said to be reflected in the amounts allowed to the subcontractors by Respondent on the jobs assigned to them by Respondent). Brown funnels all incoming work to the foremen, as previously, now designated subcontractors, and Respondent continues to be responsible to customers for shortcomings in the work done. The so-called lease or occupancy arrangements with each such subcontractor have never been reduced to writing—as testified by Brown, "It's all verbal." It is Brown who continues, since the transfer, as before, to bid on work and set the prices—*not* the subcontractors. Brown's father, Walter (Wally) Brown (Arthur Braun's brother and Ward Argust's uncle), a principal of Respondent Artcraft Iron, continues to do the same thing for Respondent Rich-Morrow doing business as Artcraft Iron as he had for some 30 years for Respondent Artcraft Iron, but now he is called a salesman. Respondent Artcraft Iron's estimator ("takeoffman"), ornamental sales, and detailer Roger Chaney continues in the same capacity under Rich-Morrow doing business as Artcraft Iron. Helen Liles, Respondent Artcraft Iron's bookkeeper/receptionist/secretary, also continues in the same capacity with Respondent Rich-Morrow doing business as Artcraft Iron, the only difference being that she now does all the bookkeeping for the subcontractors, those books and records continuing to be maintained in *Respondents'* office. Liles is still relieved, as before, by Wally Brown's wife (General Manager Brown's mother), Mildred A. Brown. Even Arthur L. Braun's son, Arthur Braun II (Junior) continues, as before, to act as janitor and general "gopher," including doing some production work. Respondent Artcraft Iron's vehicles continue to be registered in its name, although used by Respondent Rich-Morrow doing business as Artcraft Iron, as well as by the foremen/subcontractors and employees. Materials used to fulfill job orders continue to be purchased by Respondent Rich-Morrow doing business as Artcraft Iron under purchase orders signed (as before) by General Manager Brown and *not* by the subcontractors; materials are removed from storage areas and used by the subcontractors at will, without signing for the materials. Respondent makes "advances" to these subcontractors prior to completion of the work assigned to them. Respondent Artcraft Iron's two trademarks or logos, "Artcraft" and "Trashmaster," continue to be used and affixed to merchandise fabricated by the subcontractors. According to Brown, *no* consideration was paid by Respondent Rich-Morrow for the goodwill, long-established, of Respondent Artcraft Iron or for its seemingly valuable trademarks or the continued use of its name (Artcraft Iron), but only, allegedly, for inventory, and directly to Arthur L. Braun and his wife, June L. Braun, for the equipment of the business (which it is claimed was owned by them and not by the business). Brown conceded that, other than the described (and further to be described infra) conversion of foremen to subcontractors, the general operation of the business prior to and after the alleged transfer/shiftover from Respondent Artcraft Iron to Respondent Rich-Morrow doing business as Artcraft Iron has remained unchanged.

Cross-examination by Respondent of its General Manager Brown yielded a form of "Subcontract Agreement" (sic; R.-A Exh. 1) on the letterhead of Respondent Artcraft Iron, dated, it is to be observed, February 2, 1983, with H&H Fabrication (referred to elsewhere as H&H Fabricators), covering the dumpsters which it will be recalled were unilaterally contracted out by that Respondent in February (sec. II,B,1 supra). It is also to be observed that, notwithstanding the imprinted name on that letterhead ("Artcraft Ornamental Iron Co."), the document itself as well as its signature refers to the Company as "Artcraft Iron Co."—the same appendage used by Respondent Rich-Morrow since the transfer/shiftover of May 1, 1983. Some if not most of the purported subcontract agreements are not even signed by the subcontractor (R.-RM Exhs. 1, 4, 9, and 11).

Ward Argust, also called as an adverse witness by the General Counsel, testified that he is the president and sale shareholder and director of Respondent Rich-Morrow Insurance Agency, Inc.,[28] located in Mansfield, Ohio (where he lives), some 75 miles distant from the premises of Respondent Artcraft Iron; and that he is the son-in-law of Respondent Artcraft Iron's principal and president Arthur L. Braun. According to Argust, his corporation (which thereafter, according to the testimony of Respondents' General Manager Jeffrey Brown, at least in its operation of Artcraft Iron, began calling itself Rich-Morrow doing business as Artcraft Iron), an insurance agency, entered the ironcraft business about May 1, 1983, with the execution to him by his father-in-law and mother-in-law, Arthur L. and June L. Braun, of a 15-year lease, plus 5-year renewal option, covering the premises in which Respondent Artcraft Iron conducted its business.[29] Although not entirely clear, the lease

[27] Brown's testimony on this was somewhat vague. Apparently even prior to the transfer, some outside erection work had been done by outside companies. However, even assuming there was less outside erection done by Respondent after the transfer, this would not be controlling here. See discussion, sec. II,C infra.

[28] Notwithstanding Argust's sworn testimony before me to this effect, it is noted that his wife, Cheryl D. Argust (the daughter of Arthur L. Braun), is identified in the corporate minutes as the secretary as well as a director of Rich-Morrow Insurance Agency, Inc. (G.C. Exhs. 13–18).

[29] I.e., the entire building, there being no other tenant. According to General Manager Brown, up to this time these premises had been occupied by Respondent for some 30 years under an oral arrangement with Arthur Braun.

(G.C. Exh. 9) appears to reserve to the lessors (i.e., the Brauns) as well as the lessee the right to the use of the premises "jointly by Landlord and Tenant, and their respective customers and employees erected thereon" (sic; id. at sec. 1.01); it contains a security provision that the lessor "shall have the right to purchase up to fifty-one percent (51%) of the outstanding shares of Tenant" (id. at sec. 12.08). *It is further to be noted that although the lease purports to be to "Rich-Morrow Insurance Agency," it is executed by "Artcraft Iron Company" as tenant* (id. at pp. 1 and 19-20).

Also on April 29, 1983, Arthur L. Braun and June L. Braun are said to have executed to Respondent Rich-Morrow Insurance Agency, Inc. a "Sales Agreement" to sell attached scheduled equipment, tools, furniture, and vehicles—i.e., those in use in the business of Respondent Artcraft Iron—to Respondent Rich-Morrow Insurance Agency, Inc. for $146,000, of which payment of $87,000 (in undescribed form, not here established to have been made) was acknowledged, with a $60,000 1-year promissory note for the balance (G.C. Exhs. 11A and 11B), to be secured by the property purportedly transferred but with no security document executed either simultaneously or thereafter.[30] The payees of this promissory note agreed (G.C. Exh. 11B, par. 4) to subordinate the note to future bank mortgages and liens of the buyer.

As of May 12, 1983, Respondents here are said to have executed an "Agreement for Purchase of Assets," this time by "Artcraft Ornamental Iron Co., Inc." with "Rich-Morrow Insurance Agency, Inc.," calling for the sale of scheduled inventories for $36,164, of which $10,000 was payable in cash upon execution of the agreement and the balance by August 31, 1983 (G.C. Exh. 10A; no schedule attached). Notwithstanding the foregoing, it was allegedly on May 26, 1983, that Respondent Artcraft Iron executed a bill of sale to Respondent Rich-Morrow Insurance Agency, Inc. covering these items and on that date that the latter, by Ward C. Argust, executed its promissory note to the former for $26,164 (G.C. Exhs. 10B and 10C). No documentary evidence has been presented of the payment of the initial $10,000 in cash or otherwise.

Ward Argust swore here that he (or his corporation) acquired the entire goodwill of Respondent Artcraft Iron, a 50-year old enterprise, for $1. Argust further testified that the way he (or his corporation) came to acquire Artcraft Iron was that in the early part of 1983 his father-in-law, Arthur L. Braun, told him that a union had "just been voted in" and that he was disturbed about the business. After much mincing of words and testimonial equivocation, Argust conceded that Braun had expressed concern about the advent of the Union as at least potentially creating "additional problems for the company." Certainly it is fair to say that this betokens knowledge on Argust's part of the unionization of Respondent Artcraft Iron, since the president/principal of that Company, his father-in-law Arthur L. Braun, discussed it and his concern over it with him prior to the takeover of that Company by Argust's company doing business under the same name. According to Argust, he acquired that business as a "good economic possibility,"[31] but it was not feasible—for some undisclosed and factually unestablished reason—to continue to operate it under its own longstanding name. Further according to Argust, of what he regards as the $187,000 indebtedness of his company to his father-in-law, Braun, only $13,000 has been paid off—and even that not factually established here, leaving at least $174,000 still due. Again curiously, since Argust appears to be an established, experienced, and knowledgeable businessman, he explained that when and if paid all of that sum except the $26,000 for the inventory is due to Braun; however, it is to be observed that the Brauns' sales agreement "acknowledges receipt" of $87,000 "at the time of the signing of this agreement" (G.C. Exh. 11, par. 2), leaving a balance of only $60,000 to the Brauns, as shown by the accompanying promissory note (G.C. Exh. 11A).[32]

Argust also conceded (as does General Manager Brown) that there was no hiatus between the operations of Respondent Artcraft Iron and those of Respondent Rich-Morrow doing business as Artcraft Iron in connection with the "takeover." Nor did Argust receive any approval or acquiescence from any of the insurance carriers for which Respondent Rich-Morrow Insurance Agency, Inc. is agent (and presumably holds premiums) for its entry into the iron fabrication or jobbing business, an endeavor in which Argust disclaims experience, his concentration being largely in real estate development and mobile home sales. Asked at the trial if his company, Respondent Rich-Morrow doing business as Artcraft Iron, which took over the business and operations of Respondent Artcraft Iron, is willing to bargain with the Board-certified Union here, Argust responded in the negative on the ground that the Union does not represent any employees of Respondent Rich-Morrow doing business as Artcraft Iron.[33]

The testimony of Respondent Artcraft Iron's foreman and department supervisor Shelby E. McFarland, Sr., later redubbed a subcontractor and subpoenaed here by the General Counsel, affords a direct view of the precise

[30] According to testimony of Argust (seemingly contrary to that of General Manager Brown), this equipment was owned by Respondent Artcraft Iron, but "surrendered" by the latter to the Brauns in mid spring 1983 under an alleged security interest of the Brauns incepting in 1982.

[31] In seeming contrast to the present contentions of its allegedly dire economic circumstances necessitating its "going out of business" and sale to the other Respondent herein.

[32] In fairness, however, but also somewhat confusingly, Argust also mentioned in his testimony another promissory note—not produced here—for $84,000, unsecured and due in 5 years allegedly from "Rich-Morrow Realty Company, Inc. . . . another company that I own" to the Brauns. No such note or transaction is reflected in any of the documents here produced. The net upshot, however, is that, according to Argust, "only $3,000 in cash" was allegedly "paid at all in connection with the acquisition of the equipment."

[33] On cross-examination, Argust indicated that the nature of the operations here involved, following the takeover, changed from an estimated 70 percent or so for "structural and resale" items and around 25 percent for "ornamental" items, to an estimated 20 percent for structural and resale items to around 70–73 percent for ornamental items. Although this was in no way factually established, assuming arguendo that it were true, it would not be determinative here. Such a change, had it occurred under Respondent Artcraft Iron, would not of itself have relieved it of its obligation to bargain with the Board-certified Union. See discussion infra sec. II,C.

nature of what actually occurred in the shiftover from one Respondent to the other here. Although McFarland was at times an evasive, reluctant, self-contradictory, and hostile witness, and one who even attempted to change some of his testimony after an overnight recess, as the record will disclose (see, e.g., Tr. 463), nevertheless his testimony provides much necessary factual clarification as to details of what actually happened. Thus, McFarland testified that, contrary to Respondent Artcraft Iron's unionized bargaining unit employees who were terminated about April 29, 1983, he, then a foreman, continued on in his usual work but as a subcontractor, although he never bid on even a single job and never set even a single price; all of his jobs were obtained for him by Respondent's general manager Brown, who also fixed the rates to be charged. His *only* participation in job terms was to sign a printed form captioned "Sub-Contract Agreement" ("Tops Form No. 3461-Revised") presented to him by General Manager Brown or Respondents' office secretary Helen Liles (G.C. Exh. 12; see also R-RM Exhs. 1, 2, 4, 9). It is to be observed that that form (id.) is made out and signed between "Hudson Steel Fabricating Co." (the "trade name" secured for McFarland by Respondent) by McFarland as subcontractor and "Artcraft Iron Co." by Jeffrey L. Brown as contractor; that the "work" to be done is referred to as "attached work orders per Artcraft [numbered job order] worklist sheet"; that no customer is identified by name or otherwise; that all contract terms, drawings, specifications, and changes are "prepared and identified by contractor" (i.e., Artcraft Iron Co.—Rich-Morrow not even being referred to or seemingly a party to the subcontracts, even though they were subsequent to May 1, 1983 and Artcraft Iron Co. had allegedly gone out of business by that time); that all work, materials, painting, loading, and delivery are to be "per [Artcraft Iron Co. numbered worklist sheet" (as previously); and that the "payment" amount is in all cases but one omitted (in the one case preset) but to be determined by *Artcraft Iron Co.* All supposed or supporting paperwork—including even blank invoice forms—were handled for McFarland by Respondents' bookkeeper Helen Liles in and filed in Respondents' office, including receipts for gasoline and tolls. There has also been produced an Invoice from "Rich-Morrow Insurance Agency, Inc. dba Artcraft Iron Co." to "Hudson Steel Fabricating" for "Lease for month of May, 1983" (R.-RM Exh. 5); the one for half of June 1983 is a blank invoice without identification of invoicer (R.-RM Exh. 6). McFarland testified that all of these invoices—reflecting no change in the actual nature of the work he had previously performed for Respondent Artcraft Iron—were prepared by General Manager Brown who, together with Ward Argust, had instructed him that after May 1 McFarland "had to have a name," which was the only reason he utilized the trade name "Hudson Steel Fabricating Co."; and McFarland thereupon had two of his subordinates (his son Shelby McFarland, Jr. and Otis Lewis) continue to work as before and obtained two new employees (Kim Tucker and Scott Travis) to replace two (unionized) unit employees terminated by Respondent. It is to be observed that although these printed subcontract agreement forms explicitly require the purported subcontractor to "furnish all material" (art. 1), McFarland unequivocally swore he is certain that he furnished *no* materials and also that he never furnished any delivery except by vehicle of Respondents available to all of the other foremen subcontractors. He swore that he always carried out the assignments he received as subcontractor without negotiation of terms and without question; and he always paid amounts fixed as rent—he could not recall what these amounts were—by General Manager Brown without discussion of any kind. He swore that all of his books and records as subcontractor were taken care of by Respondents' bookkeeper/secretary Helen Liles in Respondents' office, at no charge. Prior to May 1983, with the sole exception of H&H working on dumpsters (supra), he had never seen any subcontracting done on Respondent's premises. After May 1, he as well as other foremen, thenceforth called subcontractors, continued to do all work assigned by Respondent to each of them, as previously, and, also as previously, continued to utilize and interchange all equipment of Respondent. Even though purportedly a subcontractor, at no time did he have any contact with any customer—as previously, Respondents' general manager Brown negotiated and fixed all prices to be charged to customers. At no time did McFarland solicit any business of his own, he had no phone listing, and he did no advertising. It was only at the insistence of Respondents that he was called a subcontractor. It was in *early April—while Respondent Artcraft Iron was still in business and professedly carrying on negotiations with the Union*—that McFarland, as he swore, was informed by Respondent Artcraft Iron's general manager Brown that he and the other foremen would have "the first opportunity to go into the subcontracting position . . . May 1st." McFarland also swore that when and after he became a subcontractor he invested no money and made no outlay of any kind; that he had no equipment of any kind; that he was at all times a subcontractor only from week to week and never had a subcontract or contract for longer than 1 week; that he at all times used Respondent's materials, equipment, and trucks; that Respondent ordered and paid for his and other foremen's wooden trade name signs placed on the outside of the building; that the source of his money to meet "his" payrolls (as well as his own salary) as subcontractor was *Respondent* at all times; that he at no time as subcontractor even billed or invoiced any customer (other than Respondent, if the latter may be so considered, and in that case all such invoices were prepared by Respondent's own bookkeeper/-secretary Liles); that since leaving that venture, at his own election because he did not wish to continue it that way, he has made no use of the trade name; and that since he left Respondent his subcontracting books and records have remained with Respondent in its office where they still presumably continue to be. At the time he left, his fellow former supervisors at Respondent Artcraft Iron—David Graham, John Graham, and Chuck McConnell—were still there, purportedly as subcontrac-

tors.[34] *Finally, McFarland also swore that his income as a week-to-week subcontractor was the same as it had been when he was called and paid weekly as a foreman*—a truly remarkable and arresting "coincidence." I find, upon the basis of McFarland's own testimony concerning the subcontractors here, that they were not in fact or in law subcontractors or independent contractors under the guiding principles established by the Supreme Court in *United States v. Silk*, 331 U.S. 704 (1947).

C. *Discussion and Resolution*

There is presented here a situation of a firmly established family business in existence for some 50 years. When its employees commenced exercising rights guaranteed to them by Congress under the Act, to organize themselves for collective bargaining, they were repeatedly warned and threatened by responsible officials of the Company that it would not tolerate the exercise of those rights. Indeed, the Company's president himself bluntly threatened that "I'll shut the f—ing doors before the union comes in" (followed up by a departmental supervisor's threat that "[General Manager] Jeff [Brown] would put a chain around the building, and a padlock to match it, before the union would come in." Undaunted, however, the unit employees, pursuing the rights statutorily guaranteed to them by Congress in the Act, selected and designated the Charging Party Union as their bargaining representative in a Board-supervised statutory election resulting in the Union's official Federal certification. This set into inexorable motion not only unilateral action detrimental to the unit employees without bargaining with their officially certified representative (dumpster subcontracting) but also, while purportedly engaging in bargaining with the Union, a scheme to thwart and defeat its unit employees' statutory rights and to negate the Board's official certification of their Union through discharging the bargaining unit members, dubbing its foremen/supervisors subcontractors to hire whomever they wished (but coincidentally debarring the terminated union activists from access to their former or any jobs), and purportedly shifting over its entire business to a close family member, its principal's son-in-law, who continued to operate it through the same general manager and executive, office, and supervisory personnel, in the same location as before, without time hiatus, serving the same customers, under the same trade name as before, and utilizing the same trademarks as before. The transparent purpose of this scheme was not to effect a legitimate, arm's-length, and bona-fide sale of this long-established business, but, put plainly, to oust the Union, to rid itself of the unwanted union supporters, to flout the Board as an agency of the United States Government, and to thumb its nose at the law and its underlying congressionally declared public policy.

That these actions, taken by Respondent Artcraft Iron—which presents no factual defense here—constituted violations of Section 8(a)(1), (3), and (5) of the Act as alleged is not open to serious doubt. The question remains whether that is in any way erased or changed, or the normal consequences of such illegal activities aborted, through the device of the shiftover of the business of Respondent Artcraft Iron to another corporation, Respondent Rich-Morrow doing business as Artcraft Iron, owned by the son-in-law of the president and principal of Artcraft Iron. I think not, regardless of whether the situation be regarded as "alter ego," "disguised continuance," or "succession"—terms which are defined as desired by a particular definer—since in any event the legal consequences, result, and outcome are the same.

It is settled through myriad cases that an employer, as here, in the throes of collective bargaining with a Board-certified union which he has vowed he would never accept, may not, in order to defeat his statutory bargaining obligation, discharge the entire bargaining unit, refuse to bargain with the union on the ground he no longer has any employees, and shift his business operations colorably to a knowledgeably participating substitute employer to operate "union-free" and thereby deliberately thwart the intent of Congress as expressed in the Act.

As stated recently by the Board in *Allcon, Inc.*, 267 NLRB 700, 705 (1983):

> The Board and courts have described the requisites of an *alter ego* or of a successorship relationship sufficient to justify a carryover of the obligations under a collective labor agreement with a predecessor. Significant elements have been said to be whether the "new" business is substantially the same, in whole or in part; whether the "new" business has its own contract with another union; whether the product or services are the same; whether the location is the same; whether the same equipment is used; whether the customers are the same; whether the business name is the same or similar; whether there is a continuity of the work force; whether the jobs are substantially the same; whether supervision is the same; and whether there was an hiatus in operations.[11] That a diminution in operations, as here, is consistent with a successorship, see *NLRB v. Fabsteel Co. of Louisiana*, 587 F.2d 689, 695 (5th Cir. 1979), cert. denied 442 U.S. 943:
>
> > The Board has long held, with court approval, that under proper circumstances, the obligation to bargain with an incumbent union may be found although the work force is considerably diminished by the transfer.

As also stated in *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982), also a case involving attempted evasion of paying fringe benefits required under a collective agreement:

> An alter ego relationship may exist when only a portion of an enterprise is purportedly transferred to a new owner. . . .

[34] It will be recalled that Respondents have stipulated that "[c]ommencing on or about May 1, 1983, Respondent Rich-Morrow contracted work previously done by employees of Respondent Artcraft to among others Shelby McFarland, David Graham, John Graham and Chuck McConnell" (G.C. Exh. 6, par. 3). There is no contention that this was at any time discussed with the Union by either of Respondents.

. . . .

> Nor is the balance shifted by testimony that [Respondent] uses primarily asphalt, rather than concrete, and does a smaller percentage of its work on government contracts.

A "continuity of operation across the change in ownership"—even assuming, *arguendo*, that there has occurred a real change of ownership here—requires at least recognition of and bargaining with the incumbent union (*Wiley v. Livingston*, 376 U.S. 543 (1964)), whether or not the substantive obligations of the labor agreement continue to bind the successor (*NLRB v. Burns Security Services*, 406 U.S. 272 (1972)); but where the "subsequent" employer is but a disguised continuation (albeit at a scaled-down level, cf. *Fabsteel, supra*) or *alter ego* of the "predecessor" employer, even the substantive contractual obligations carry over (*Crawford Door Sales Co.*, 226 NLRB 1144 (1976)) and the "subsequent" employer may even be held accountable for the "predecessor's" unfair labor practices, particularly if an *alter ego* thereof (*Atlantic Paper Co.*, 121 NLRB 125 (1958)).

[11] See, e.g., *Johnston Ready Mix Co.*, 142 NLRB 437 (1963).

The situation herein truly smacks of what the Supreme Court has characterized as a "technical change in the structure or identity of the employing identity . . . to avoid the effect of the labor laws, without any substantial change in its ownership or management," with the result that the "successor," "alter ego," or "substitute" continues to be "subject to all the legal and contractual obligations of the predecessor" (*Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 (1974)), as "a disguised continuance of the old employer" (*Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). See also *Howard Johnson Co. v. Hotel & Restaurant Employees*, supra at fn. 5; *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3d Cir. 1983); *Nelson Electric v. NLRB*, 638 F.2d 965 (6th Cir. 1981); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960); *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F.2d 445 (9th Cir. 1949); *Allcon, Inc.*, supra; *Fugazy Continental Corp.*, 265 NLRB 1301 (1982); *American Pacific Pipe Co.*, 262 NLRB 1223 (1982); *St. John's Construction Corp.*, 258 NLRB 471 (1981); *Farmingdale Iron Works*, 249 NLRB 98 (1980); *McDonald's Readi-Mix Concrete*, 246 NLRB 152 (1979); *Blake Construction Co.*, 245 NLRB 630 (1979); *Shield-Pacific, Ltd.*, 245 NLRB 409 (1979); *Century Printing Co.*, 242 NLRB 659 (1979), enfd. 661 F.2d 914 (3d Cir. 1981); *Big Bear Supermarkets #3*, 239 NLRB 179 (1978), enfd. 640 F.2d 924 (9th Cir. 1980); *Sturdevant Sheet Metal Co.*, 238 NLRB 186, 188 (1978), enfd. 636 F.2d 271 (10th Cir. 1980); *Dee Cee Floor Covering*, 232 NLRB 421 (1977); *Co-Ed Garment Co.*, 231 NLRB 848 (1977); *Crawford Door Sales Co.*, supra; *P. A. Hayes, Inc.*, 226 NLRB 230 (1976); *Flite Chief, Inc.*, 220 NLRB 1112 (1975), enfd. 106 LRRM 2968 (9th Cir. 1977); *Helrose Bindery*, 204 NLRB 499 (1973); *Rushton & Mercier Woodworking Co.*, 203 NLRB 123 (1973), enfd. mem. 502 F.2d 1160 (1st Cir. 1974). Also violative of the Act are employer threats of reorganization of its method of doing business to thwart unionization (*Chester Valley, Inc.*, 251 NLRB 1455 (1980), enfd. in relevant part 652 F.2d 263 (2d Cir. 1981)), and threats to set up another company to avoid the bargaining obligation (*Owen Lee Floor Service*, 250 NLRB 651 (1980)). Even a bona fide successor having knowledge of a predecessor's unfair labor practices—much more so one who knowledgeably participates therein—may be ordered to remedy them. Cf., e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Winco Petroleum Co.*, 668 F.2d 973 (8th Cir. 1982).

That not even lack of identical corporate ownership will bar a finding of alter ego status, see, e.g., *J. M. Tanaka Construction v. NLRB*, supra; *Crawford Door Sales Co.*, supra.

As shown and found, what is presented here, against the indicated background of intense employer hostility to and nonacceptance of its statutory bargaining obligation, is a mere shiftover of a long-established business to the corporation of a close relative of its principal, without hiatus in time or operations, i.e., uninterrupted continuation of the same business under the same trade name, logos, and trademarks, at the same location, utilizing the same equipment and serving the same customers in the same fabrication operation, with essentially the same personnel, except for the summarily discharged unionists, who have been refused reemployment while others have been hired. There is presented here no conventional arm's-length sale of a business, but rather a colorable deal or scheme, with features enabling ready recapture control by the alleged predecessor/transferor, accompanied by a cosmetic change in the method of operations to subcontractorships by the foremen (a change which could not only as well have been effected by the transferor corporation but was actually, indeed, announced by it prior to the transfer to the transferee corporation), but without real significance to the foremen or rank-and-file employees, without real effect on the customers, and with Respondents continuing to maintain total control over the operation of the very same business—a paper shiftover from one corporation to a close relative's corporation to flout the statutory bargaining obligation established by Federal law.

The statutorily enacted and Board-administered representation election mechanism of the Act was not provided by Congress to be flouted and aborted through the device of colorably passing assets from one corporate employer to another owned by the first corporation's principal's son-in-law engaged in a totally unrelated type of business elsewhere (while continuing the transferred business in place) in a transparent ploy to avoid the necessity for compliance with the Act and to defeat the rights of employees to do what Congress expressly guaranteed them the right to do.

Here there are present literally all of the elements required by the Board and courts in the aforecited decisions to support the conclusion of alter ego, disguised continuance, or successorship: continuation of company

trade name, trademarks, and logos; no hiatus in operations; same location; same equipment; same customers; same executive, supervisory, and supporting staff; and essentially same or same type of work force, except for unlawfully discharged unionized unit employees covered by the Board's official certification. As conceded at the hearing, the only difference attending the shiftover was the dubbing of foremen as subcontractors, although Respondent continued, as before, to deal with all customers, estimate and bill all jobs, and even to take care of and maintain the records and files of the subcontractors, who continued to make the same amount of money as they did while foremen. It is entirely clear that, if the bargaining unit employees had not been discharged and if the predecessor had instituted such a subcontracting system unilaterally, as here, it would have been in violation of the Act. It is also entirely clear that if the successor had not instituted such a system, the operation would in all particulars have been precisely identical to that of the predecessor. The colorable conversion to a subcontractor system through its own former foremen is in no way determinative here, since, if such a redubbing through change in nomenclature were controlling, an employer could through that device defeat Board certification and the policies of the Act, thereby evading its bargaining obligation through its own stratagem. See, e. g., *Fabsteel, Tanaka, Allcon, Hayes,* and *St. John's Construction,* supra.

Respondents' basic contention appears to be that Respondent Artcraft Iron had the right to go out of business. Of course it did, for whatever reason. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). But this contention misperceives or skews the issue. The complaint does not allege that Respondent Artcraft Iron committed an unfair labor practice by going out of business. The issue here is not that at all, but instead—aside from sundry independent unfair labor practices committed by that Respondent, as here found without contest—whether Respondent Rich-Morrow doing business as Artcraft Iron, in knowingly participating in a colorable shiftover to itself of the business of Respondent Artcraft Iron, under the circumstances shown, is an alter ego, disguised continuance, or successor of Respondent Artcraft Iron so as to have acquired the Artcraft Iron business freighted with its obligation to continue to bargain with its federally certified bargaining representative; and whether Rich-Morrow doing business as Artcraft Iron is chargeable with repair of the consequences of its knowledgeable participation in the colorable death warrant dealt by its predecessor to the entire bargaining unit by discharging its members during the pendency of bargaining, through the simplistic expedient of dubbing its foremen subcontractors in order to lend surface plausibility to the contention that the business no longer had unit, that is to say unionized, employees, but only workers employed by contractors operating independently of Respondents. In consideration and determination of these issues, it is entirely clear and I find that the predecessor corporate Respondent here contrived and sought to obtain and purportedly did obtain substantial economic benefit through the transfer to the successor corporate Respondent by ostensibly shucking off and ridding itself of its statutory bargaining obligation and discharging its employees who had sought to exercise their rights under the Act.

Respondents further contend that they had the right to change their method of operations from employing employees to utilizing subcontractors as a more economical or profitable alternative. While this is undoubtedly true, such a defense has not been made out here, since (1) Respondents, electing to rest at the conclusion of the General Counsel's case without calling any witness, presented no factual proof in support of this contention; (2) the colorable nature of the redubbing of the foremen as subcontractors has already been described in detail supra; (3) even if, unlike here, such a contention were factually established, it would still constitute a violation of the Act to discharge the members of the certified statutory bargaining unit by implementing such a decision unilaterally without bargaining with the officially certified bargaining representative. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962). Furthermore, by electing to rest without presentation of proof, Respondents have totally failed in fact to rebut the General Counsel's prima facie showing that the unit employees were terminated en masse here in order to purge the business of unionists and to restrain and coerce employees in exercise of their rights under the Act. Respondents having elected not to adduce any proof, to say nothing of preponderating proof, as required, to the contrary, the General Counsel's showing in this regard stands solidly established. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under the circumstances, in view of the facts as found and the applicable law, cited supra, deemed to be controlling here, it is accordingly determined that, essentially as alleged in the complaint, Respondent Rich-Morrow doing business as Artcraft Iron is the alter ego or disguised continuance of, or successor to, Respondent Artcraft Iron; and that the jointly shared purpose of Respondents, known to and participated in by Respondent Rich-Morrow, to terminate all of the bargaining unit employees and to fail and refuse to bargain further with their Board-certified bargaining representative was to attempt to escape from and overcome the statutory certification of the Charging Party Union and the bargaining obligation under the Act, and to interfere with, coerce, and restrain employees in the exercise of their rights under the Act, through utilizing the purported conversion of foremen to subcontractors as a device and screen to lend surface plausibility to Respondents' scheme to evade the Act. Cf. *St. John's Construction Corp.*, 258 NLRB 471 (1981).[35]

On the foregoing findings and the entire record, I state the following

[35] There was some intimation at the trial, as on brief, that Respondent Artcraft Iron is now involved in a bankruptcy proceeding. Although neither this nor any adjudication was factually established, even if true it would not erase its violations of the Act and thus not be a defense to the allegations here, although a discharge might affect the efficacy of remediation as to that Respondent. Cf., e.g., Sec. 15 of the Act; *Nathanson v. NLRB*, 344 U.S. 25, 30 (1952); *Allcon, Inc.*, 267 NLRB 700 (1983); *In re Wilson Foods Corp.*, 115 LRRM 2140 (Bankr. W.D. Okla. 1983).

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted in this proceeding and over all parties thereto.

B. At all material times as set forth and described in section II, supra, and continuously since April 29, 1983, Respondent Rich-Morrow Insurance Agency, Inc., has been and is the alter ego, disguised continuation, or successor of Respondent Artcraft Ornamental Iron Co. and a single employer with it within the meaning of the Act.

C. By engaging and continuing to engage in the acts set forth and found in section II, supra,[36] Respondents and each of them have:

1. Interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 and continue to do so in violation of Section 8(a)(1) of the Act:

2. Discriminated and continue to discriminate in regard to the hire, tenure, and terms and conditions of employment of employees, thereby discouraging or encouraging membership in a labor organization in violation of Section 8(a)(3) of the Act:

3. Failed and refused to bargain in good faith, and continue to do so, with the duly elected and Board-certified exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit in violation of Section 8(a)(5) of the Act:

> All production and maintenance employees, including structural, ornamental, installation and miscellaneous department employees employed at Respondents' Columbus, Ohio facility, but excluding all office clerical employees, engineering employees, and all professional employees, guards and supervisors as defined in the Act.[37]

D. Said unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Respondent Artcraft Iron should be required to cease and desist from interrogating and threatening employees as herein found; from unilaterally discontinuing any of their established work-related fringe benefits; from discriminatorily failing or refusing to recall them to employment from layoff; from unilaterally subcontracting out unit work; from failing or refusing to provide its unit employees' bargaining representative with information and data reasonably required for collective bargaining; and from failing and refusing to bargain collectively in good faith with the Charging Party Union as the duly elected and certified bargaining representative of the employees in the appropriate bargaining unit. Inasmuch as Respondent Rich-Morrow doing business as Artcraft Iron knowledgeably and deliberately participated with Respondent Artcraft Iron in a common plan, stratagem, and device to overcome the Board's official certification of the Charging Party Union as the duly elected statutory bargaining representative of the unit employees here by attempting to disestablish the certified bargaining unit through terminating the employment of the members thereof, allegedly subcontracting out all of the unit work, and purposefully and deliberately failing and refusing to employ or reemploy such terminated employees (namely, Robert William Deal, William M. Diedrich, Wilson Ford, Steve R. Friley, Ronald Lee Monroe, and Jeffrey F. O'Hara) since April 29, 1983, as well as discriminatorily failing to recall between February and April 29, 1983, two previously laid-off employees (namely, Wilson Ford and Jeffrey F. O'Hara), both Respondents should be required to offer immediate and full reinstatement to all of those employees into their employment and former jobs (or, if such jobs no longer exist, to substantially equivalent jobs), terminating, if necessary, any and all other employees serving in their place and stead; and to make them whole, with interest, for any wages, overtime pay, accruals, bonuses (including unilaterally discontinued Thanksgiving and Christmas bonuses), and benefits of whatsoever nature (including vacations and vacation pay and hospitalization and other medical benefits, with reimbursement for any expenses or obligations incurred by reason of any cancellation, withdrawal, lapse, or nonpayment of premiums thereon by Respondents or either of them) lost or unpaid by reason of said nonrecalls and terminations, and with full restoration of seniority as though the nonrecalls and terminations had not occurred, all as determinable in a supplemental backpay proceeding if necessary. Sums and interest due should be computed as explicated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Respondents should also be required to disestablish their so-called subcontracting or contracting-out system instituted after the Board's official certification of the bargaining unit herein, and to reinstitute the former direct employment system,[38] making no change therein unilaterally without good-faith bargaining with the Charging Party Union concerning any such decision and the effects thereof upon the certified bargaining unit and the members thereof; and to bargain collectively with the Charging Party Union, at its request, as the duly elected and officially certified bargaining representative of the unit employees. Respondents should also be required seasonably to provide to the Charging Party Union, at its request, information and data reasonably necessary for collective bargaining, including all subcontracting and contracting-out documents, data, and entries, and also including all documents, data, and entries concerning any alleged sale or transfer of assets of any nature whatsoever from Respondent Artcraft Iron to Respondent Rich-Morrow (including Rich-Morrow doing business as Artcraft Iron).

[36] Particularized in relation to complaint allegations and otherwise in attached Appendix A. [Appendix A omitted from publication.]

[37] Although Respondents' answers deny the appropriateness of this unit, alleged in the complaint (par. 9(a)), as well as its certification (id. at par. 9(b)), the fact is (see G.C. Exhs. 4 and 5) that this is the unit found appropriate and certified by the Board's Regional Director in Case 9-RC-14152, and I take official notice thereof. "[I]t is unnecessary to embark on a unit determination analysis once there is adequate evidence to support the finding [of] . . . alter ego." *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 554 (3d Cir. 1983); *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979).

[38] Cf. *St. John's Construction Corp.*, supra.

Respondents should further be required to preserve and make available to the Board's agents their books and records for backpay computation and compliance determination purposes, and to post the usual informational notice to employees. Finally, in view of Respondents' calculated, deliberate, and serious flouting of the Board's certification in their device and stratagem to evade the Act's requirements and to thwart and retaliate against their employees for exercising rights guaranteed to them by Federal law, seeking to undermine the very basic policy and purpose of the Act, Respondents should also be required to cease and desist from further violation of the Act.[39]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

It is hereby ordered that

A. Respondent Artcraft Ornamental Iron Co., Inc., its officers, directors, officials, agents, successors, and assigns, shall cease and desist from

1. Interrogating employees, in violation of the National Labor Relations Act, concerning their or other employees' union membership, activities, affiliations, or sympathies, or regarding how they voted in any National Labor Relations Board-conducted election for bargaining representative.

2. Threatening employees, in violation of the Act, with plant closure or business discontinuance in the event of the designation, selection, or election by employees of a labor organization for collective bargaining.

B. Respondents Artcraft Ornamental Iron Co., Inc. and Rich-Morrow Insurance Agency, Inc., their respective officers, directors, officials, agents, successors, and assigns, shall cease and desist from

1. Unilaterally and without bargaining in good faith with the labor organization bargaining representative of the employees of Respondents, or either of them, discontinuing any established policy, system, or practice of paying bonuses, including Thanksgiving bonuses and Christmas bonuses, to such employees.

2. Discriminatorily, in violation of the Act, failing to recall to employment laid-off employees of the Respondents, or either of them, because of their leadership, activism, or participation in lawful activities under the Act.

3. Unilaterally and without bargaining in good faith with the labor organization bargaining representative of the employees contracting out or subcontracting the work of the employees so as to deprive the employees of such work.

4. Failing and refusing to provide and supply to the employees' labor bargaining representative information and data requested and reasonably necessary and required by the bargaining representative for bargaining purposes with Respondents, or either of them, on behalf of the employees, including, but not limited to, information and data concerning rates of pay and hire of all employees and cost factors on insurance and vacations and holidays, and information and data concerning any sale or transfer, or purported or proposed sale or transfer, of the business or business assets of Respondent Artcraft Ornamental Co., Inc. to Respondent Rich-Morrow Insurance Agency, Inc., such as to impact on the jobs or wages, terms, and conditions of employment of the employees.

5. Failing or refusing to bargain collectively in good faith with Shopmen's Local Union No. 626 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO as the duly elected and Board-certified exclusive bargaining representative of employees in the following appropriate bargaining unit:

> All production and maintenance employees, including structural, ornamental, installation and miscellaneous department employees employed by Respondents (or either of them) at their Columbus, Ohio facility, but excluding all office clerical employees, engineering employees, and all professional employees, guards and supervisors as defined in the Act.

6. Terminating or participating in the termination of employees, in violation of the Act, for exercising rights guaranteeed them under the Act, such as (but not limited to) by purportedly reorganizing the business employing such employees from a conventional employer-employee relationship to a purported contracting or subcontracting relationship, with such employees' foremen redesignated as contractors or subcontractors so as ostensibly to eliminate all employees and terminate their employment with Respondents or either of them, and thereafter discriminatorily, in violation of the Act, failing and refusing to rehire or employ the terminated employees.

7. Unilaterally changing or purporting to change the mode of operations and business structure of Respondents, or either of them, from employment to purported contracting or subcontracting out, without bargaining in good faith with the labor organization bargaining representative of the employees with respect thereto and the effects thereof on the employees.

8. Through utilization of a juridical entity, or through shifting unit work to such other entity, or otherwise, in violation of the Act, unilaterally evading or attempting to evade or escape from the obligation to deal with the employees' representative certified by the Board in consequence of an election under the Act.

9. In any other manner violating the Act so as to deny or deprive employees of their freedom to exercise their rights thereunder, or so as by deliberate design, unlawfully and in violation of the Act, to flout, defeat, and overcome the official statutory certification by the Board under the Act of the employees' bargaining representative.

C. Respondents Artcraft Ornamental Iron Co., Inc. and Rich-Morrow Insurance Agency, Inc., their respective officers, directors, officials, agents, successors, and

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[39] Cf., e.g., *A. J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970); *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

assigns, shall take the following affirmative actions necessary to effectuate the policies of the Act.

1. Notify the above-named Union in writing, within 10 days from the date of this Order, that the recognition of the Union as officially certified exclusive statutory bargaining representative of the aforementioned collective-bargaining unit is acknowledged, confirmed, and continued for all purposes.

2. Disestablish the purported contracting or subcontracting system unilaterally announced by Respondent Artcraft Ornamental Iron Co., Inc. with the knowledge and participation of Respondent Rich-Morrow Insurance Agency, Inc. prior to the transfer of the business of the former to the latter about April 29, 1983, and purportedly effectuated in connection with that transfer, and resume operations on an employer-employee basis as it existed at the time of the Board's official certification of the bargaining representative following the Board-conducted statutory election, and make no change therein affecting the wages, terms, and conditions of employment of employees without bargaining in good faith with the bargaining representative.

3. Retroactively reinstate the Thanksgiving and Christmas bonus policy and practice which were discontinued unilaterally in November and December 1982 without bargaining with the bargaining representative, and make whole all employees deprived thereof, together with interest.

4. Promptly furnish to the Union all information and data reasonably necessary for bargaining purposes, including, but not limited to, a list of rates of pay and hire dates of all employees (including all employees of Respondent Artcraft Ornamental Iron Co., Inc. and all employees of Rich-Morrow Insurance Agency, Inc., including all alleged employees of alleged contractors or subcontractors thereof conducting business on the premises of Respondents or either of them); cost factors on insurance, vacations, and holidays; and information and data regarding the sale and transfer or purported sale and transfer of the business and assets of one Respondent to the other Respondent about and since April 29, 1983.

5. Offer Robert William Deal, William M. Diedrich, Wilson Ford, Steve R. Friley, Ronald Lee Monroe, and Jeffrey F. O'Hara immediate, full, and unconditional reinstatement to their former positions held in the employ of Respondent Artcraft Ornamental Iron Co., Inc. (or, if not available, to substantially equivalent positions), without prejudice to their seniority and other rights, privileges, benefits, and emoluments, including but not limited to any and all wage and pay scale increases and progressions as if not terminated about April 29, 1983; and make them whole for any loss of income (including overtime pay, holiday and vacation pay, and reimbursement for all hospitalization, surgical, medical, and other payments or obligations incurred by reason of any cancellation, withdrawal, or nonpayment of premiums on any applicable insurance coverages in consequence of their termination and nonemployment on and since that date), together with interest, in the manner set forth in the remedy portion of the decision of which this Order forms a part. In the case of Wilson Ford and Jeffrey F. O'Hara, additionally make them whole, with interest and otherwise as above specified, for all wages and benefits and emoluments lost by reason of the discriminatory failure to recall them to employment from February 1983 until their aforesaid termination about April 29, 1983; but this additional obligation for the period from February to April 29, 1983, shall be applicable only to Respondent Artcraft Ornamental Iron Co., Inc.

6. On request, bargain in good faith with the Union as such exclusive collective-bargaining representative retroactively as of April 28, 1983, the date of Respondent's unilateral discontinuance of bargaining and announcement of refusal to participate in further bargaining; and embody in a signed agreement any understanding reached.

7. Preserve and on request make available to the Board or its agents for examination and copying, all payroll records, wage rate and income records, work schedules, overtime records, contracting and subcontracting records, personnel records and reports, and all other records necessary to determine the amounts of backpay and other sums due under and the extent of compliance with the terms of this Order.

8. Post at their premises in Columbus, Ohio, copies of the attached notice marked "Appendix B."[41] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

9. Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

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[41] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."